

1 JOSHUA N. KASTAN (SBN 284767)

JNK@dkmlawgroup.com

2 JESSICA J. ROSS (SBN 313988)

JJR@dkmlawgroup.com

3 **DKM LAW GROUP, LLP**

50 California St., Suite 1500

4 San Francisco, CA 94111

Tel.: (415) 421-1100

5 Fax.: (415) 842-0095

6 Attorneys for Defendant,
USAA CASUALTY INSURANCE COMPANY

7
8 **IN UNITED STATES DISTRICT COURT**
9 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

10 JEREMY R. WHITELEY,

11 Plaintiff,

12
13 vs.

14 USAA CASUALTY INSURANCE
15 COMPANY,

16 Defendant.

CASE NO.: 2:24-cv-00138-FLA-MAA

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANT USAA CASUALTY
INSURANCE COMPANY'S
MOTION FOR SUMMARY
JUDGMENT**

Hearing Date: March 14, 2025

Hearing Time: TBD

Crtrm.: 6B

Judge: Hon.Aenlle-Rocha

Cmplt. Filed: Jan. 5, 2024

TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. UNDISPUTED MATERIAL FACTS	4
A. THE HOMEOWNERS POLICY LANGUAGE.....	5
B. THE UMBRELLA POLICY LANGUAGE	7
C. THE BCS COMPLAINT	9
D. USAA CIC’S INVESTIGATION AND COVERAGE DETERMINATION.....	10
E. USAA CIC DETERMINES THE DUTY TO DEFEND OR INDEMNIFY WAS NOT TRIGGERED	12
III. LEGAL STANDARD.....	15
IV. USAA CIC’S DUTY TO DEFEND OR INDEMNIFY WAS NOT TRIGGERED	16
A. THERE IS NO “BODILY INJURY” OR “PROPERTY DAMAGE” ALLEGED IN THE BCS COMPLAINT, AND THE DUTY TO DEFEND WAS NOT TRIGGERED.....	17
B. THERE IS NO “PERSONAL INJURY” ALLEGED IN THE BCS COMPLAINT, AND THE DUTY TO DEFEND WAS NOT TRIGGERED.....	18
1. <i>The BCS Complaint Does Not Allege “Personal Injury”</i>	19
2. <i>Even Assuming “Personal Injury”, Multiple Exclusions Apply to Foreclose Coverage</i>	21
3. <i>Even Assuming “Personal Injury” Is Alleged and No Exclusions Apply, there is No Duty to Defend an Action Alleging Purely Economic Damages</i>	23
V. THE BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING CLAIM FAILS	24
VI. THE CLAIM FOR DECLARATORY RELIEF FAILS.....	28
VII. THE CLAIM FOR PUNITIVE DAMAGES FAILS.....	29
VIII. CONCLUSION	31

TABLE OF AUTHORITIES

CASES

<i>Anderson</i> , 477 U.S. at 250 (citation omitted)-----	15, 16
<i>Austero v. Nat. Gas Co.</i> (1978) 84 Cal.App.3d 1 -----	26
<i>Beck v. State Farm Mut. Auto. Ins. Co.</i> (1976) 54 Cal. App. 3d 347 -----	29
<i>Benavides v. State Farm Gen. Ins. Co.</i> , 136 Cal. App. 4th 1241, 1250 (2006) -----	24
<i>Careau & Co. v. Sec. Pac. Bus. Credit, Inc.</i> , (1990) 222 Cal. App. 3d 1371, 1395 --	25
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 322-323 (1986)-----	15
<i>Chateau Chamberay Homeowners Ass 'n v. Associated Int'l Ins. Co.</i> (2001) 90 Cal. App. 4th 335 -----	4, 25
<i>Congleton v. National Union Fire Ins. Co.</i> (1987) 189 Cal. App. 3d 51 -----	25
<i>Delgado v. Interinsurance Exch. Of Auto. Club of S. Cal.</i> , 47 Cal.4th 302, 308 (2009) -----	17
<i>Ittelia Foods, Inc. v. Zurich Ins. Co.</i> (9th Cir. 2004) 98 Fed. Appx. 689 -----	30
<i>Matsushita Elec. Indus. Co. v. Zenith Radio Corp.</i> , 475 U.S. 574, 587 (1986)-----	15
<i>Montrose Chemical Corp. v. Superior Court</i> 6 Cal.4th 287, 295 (1993) -----	16
<i>Morris v. Paul Revere Life Ins. Co.</i> (2003) 109 Cal.App.4th 966, 977 -----	25
<i>Scottsdale, Ins. Co. v. Darke</i> , 424 F.Supp.3d 638, 644 (N.D. Cal. 2019)-----	23
<i>State Farm Mut. Auto. Ins. Co. v. Superior Ct.</i> (1991) 228 Cal. App. 3d 721, 725, modified (Mar. 21, 1991 -----	3
<i>State Farm Mut. Auto. Ins. Co. v. Superior Ct.</i> (1991) 228 Cal. App. 3d 721, 725, modified (Mar. 21, 1991) -----	3, 25
<i>Street Surfing, LLC v. Great American E&S Ins. Co.</i> , 776 F.3d 603, 607 (9th Cir. 2014)-----	16
<i>Swain v. Cal. Cas. Ins. Co.</i> (2002) 99 Cal. App. 4th 1 -----	17
<i>Tibbs v. Great American Ins. Co.</i> (9th Cir. 1985) 755 F.2d 1370-----	30
<i>Tomaselli v. Transamerica Ins. Co.</i> (1994) 25 Cal. App. 4th 1269-----	30
<i>Travelers Property Casualty Company of America v. Allwire, Inc.</i> , 508 F.Supp.3d 736, 745-746-----	23
<i>Turner v. State Farm Fire and Cas. Co.</i> (2001) 92 Cal.App.4th 681, 690 -----	17
<i>Waller v. Truck Ins. Exch.</i> , 11 Cal. 4th 1, 19 (1995)-----	2, 16, 17, 23
<i>White v. Ultramar, Inc.</i> (1999) 21 Cal. 4th 563 -----	31
<i>Wilson v. 21st Century Ins. Co.</i> (2007) 42 Cal.4th 713 -----	25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

STATUTES

Cal. Civ. Code § 3294(a)	-----29
Cal. Civ. Code § 3294(b)	----- 29, 31
Cal. Civ. Code. §1668	----- 17
Fed. R. Civ. P. 56	----- 15

OTHER AUTHORITIES

CACI 2331-2332	-----24
----------------	---------

1
2
3 **I. INTRODUCTION**

4 The undisputed material facts demonstrate as a matter of law, Defendant
5 USAA Casualty Insurance Company (“USAA CIC”) had no duty to defend Plaintiff
6 Jeremy Whiteley (“Whiteley”) in an underlying lawsuit filed against him. The
7 undisputed facts further show USAA CIC’s investigation and coverage determination
8 was reasonable and timely, especially where USAA CIC relied upon the advice of
9 coverage counsel. Further, there is no evidence whatsoever of malicious or
10 oppressive conduct by USAA CIC ratified by an officer or director which could
11 possibly give rise to a claim for punitive damages.
12
13
14

15 The underlying complaint was filed against Whiteley by non-profit
16 organization Breaking Code Silence (“BCS”), of which he was a former board
17 member, and alleged two causes of action for violations of federal anti-hacking
18 statutes and California’s Penal Code (“BCS Complaint”).
19

20 Whiteley maintained Homeowners and Umbrella policies with USAA CIC,
21 each of which carried personal liability coverage subject to certain unambiguous (and
22 slightly different) terms, conditions, limitations and exclusions.
23

24 Under the Homeowners Policy, USAA CIC’s duty to defend was only triggered
25 if the BCS Complaint sought damages caused by bodily injury, property damage, or
26 personal injury caused by an occurrence. For coverage for a lawsuit based on
27
28

1 personal injury (i.e. libel, slander, defamation, invasion of privacy) to apply, the
2 conduct could not be malicious or criminal in nature and could not be expected or
3 intended by Whiteley.
4

5 Under the Umbrella Policy, USAA CIC's duty to defend was only triggered if
6 the BCS Complaint alleged injury arising out of an oral, written or electronic
7 publication of a false statement that defamed BCS' character or reputation. Where
8 Whiteley knew any defamatory statement made was false, the personal injury arose
9 from a criminal act, or arose out of an agreement, coverage was excluded.
10
11

12 Even if coverage were triggered, which it was not, California law is clear an
13 insured is not entitled to a legal defense where the underlying complaint seeks
14 damages which are only financial in nature. (*Waller v. Truck Ins. Exch.*, 11 Cal. 4th
15 1, 19 (1995).)
16

17 As discussed in further detail below, the allegations within the BCS Complaint
18 did not fall within the coverage promise of either the Homeowners or Umbrella
19 Policies. The BCS Complaint alleged Whiteley and another former board member,
20 Katharine McNamara ("McNamara") acted in concert to sabotage BCS's business
21 practices and unjustly enrich themselves by, among other things, hacking into and
22 deindexing BCS's Google account, hacking into and changing content on its website,
23 tampering with or destroying confidential proprietary information, and interfering
24 with business relationships. The allegations focused entirely on intentional,
25
26
27
28

1 malicious, criminal conduct by Whiteley and McNamara. The BCS Complaint sought
2 only economic and financial damages, and equitable relief.

3
4 Absent any allegation within the BCS Complaint triggering coverage, and in
5 the face of multiple, applicable exclusions, USAA CIC's duty to defend Whiteley
6 was not triggered and USAA CIC cannot have breached the contract.

7
8 The undisputed facts further demonstrate USAA CIC acted within the scope of
9 the implied covenant of good faith and fair dealing. USAA CIC's investigation was
10 reasonable. USAA CIC considered the allegations within the BCS Complaint,
11 interviewed Whiteley, had the BCS Complaint reviewed by an adjuster, manager, and
12 director in conjunction with both the Homeowners and Umbrella Policies, and sought
13 the advice of coverage counsel. In a robust and well-founded letter, coverage counsel
14 stated in his opinion the duty to defend was not triggered. When Whiteley belatedly
15 disputed the coverage determination over a year later, coverage counsel reviewed all
16 new information and provided an affirmed the coverage opinion, upon which USAA
17 CIC reasonably relied. (*State Farm Mut. Auto. Ins. Co. v. Superior Ct.* (1991) 228
18 Cal. App. 3d 721, 725, *modified* (Mar. 21, 1991) [“an insurer may defend itself
19 against allegations of bad faith and malice in claims handling with evidence the
20 insurer relied on the advice of competent counsel”].)

21
22 At most, there was a genuine dispute between Whiteley and USAA CIC as to
23 whether coverage was triggered by the BCS Complaint. California law is clear a
24
25
26
27
28

1 genuine dispute is a complete defense to a claim for breach of the implied covenant.
2 (*Chateau Chamberay Homeowners Ass 'n v. Associated Int'l Ins. Co.*, 90 Cal. App.
3 4th 335, 347 (2001).)

4
5 The totality of USAA CIC's investigation and coverage determination likewise
6 demonstrate Whiteley cannot proffer any support for his claim for punitive damages,
7 much less to California's requisite "clear and convincing" standard. The undisputed
8 facts are devoid of any instance of USAA CIC acting with malice or oppressively.
9 Nor is there any evidence a managing agent ratified conduct.

10
11
12 Where the undisputed material facts demonstrate USAA CIC had no duty to
13 defend Whiteley under the homeowners or umbrella policies, conducted a reasonable
14 and timely investigation revealing nothing more than a genuine dispute between the
15 parties, and did not act maliciously or oppressively, Whiteley cannot meet his burden
16 of proof as to any of his causes of action and the Court should enter judgment for
17 USAA CIC.
18
19

20 21 **II. UNDISPUTED MATERIAL FACTS**

22
23 The undisputed material facts demonstrate USAA CIC's duty to defend or
24 indemnify Whiteley was not triggered, and its investigation and coverage
25 determination was reasonable.
26
27
28

1 USAA CIC issued Homeowners Policy, No. 007778375-90A (“Homeowners
2 Policy”), and Umbrella Policy, No. 007778375-70U (“Umbrella Policy”), to
3 Whiteley (collectively “Policies”). (S.S. 1, 2.) The Policies provided coverage for
4 personal liability subject to certain terms, conditions, limitations and exclusions.
5

6 On March 28, 2022, non-profit Breaking Code Silence (“BCS” filed a
7 complaint against Whiteley and Katherine McNamara (“McNamara”) alleging causes
8 of action for violations of the Computer Fraud and Abuse Act (18 U.S.C. §1030) and
9 California’s Computer Data Access and Fraud Act (Cal. Penal Code § 502) (“BCS
10 Complaint”). (S.S. 3.)
11

12 Whiteley made separate claims with USAA CIC for a legal defense and
13 indemnification under the Policies.
14

15 16 **A. The Homeowners Policy Language**

17 In pertinent part, the Homeowners Policy states:
18

19 **UNIT OWNERS – HOMEOWNERS POLICY** 20 **-PERSONAL INJURY ENDORSEMENT-** 21 **COVERAGE E – PERSONAL LIABILITY**

22 If a claim is made or a suit is brought against any “insured” for
23 damages because of “bodily injury”, “property damage” or
24 “personal injury” caused by an “occurrence” to which this
coverage applies, we will:

25 * * *

- 26 1. Provide a defense at our expense by counsel of our choice,
even if the suit is groundless, false, or fraudulent...

27 We will not pay for punitive “damages” or exemplary
28 “damages”, fines or penalties.

1
2 (S.S. 4.)

3 The Homeowners Policy's Personal Injury Endorsement unambiguously
4 defines "personal injury" and "occurrence":
5

6 **"Personal Injury"** means:

- 7 b. Libel.
8 c. Slander.
9 d. Defamation of character.
10 e. Invasion of rights of privacy.

11 ***

12 **"Personal injury"** only applies when the conduct is not
13 malicious or criminal in nature.

14 ***

15 **"Occurrence"** means:

- 16 a. An accident ... which results, during the policy period, in
17 "bodily injury" or "property damage" ...
18 b. An event or series of events ... proximately caused by an
19 act or omission of any "insured", which results, during
20 the policy period, in "personal injury", neither expected
21 nor intended from the standpoint of the "insured."

22 (S.S. 5.)

23 The Homeowners Policy defines "bodily injury" and "property damage" as:

24 - DEFINITIONS -

25 ***

- 26 2. "Bodily injury" means physical injury, sickness or disease,
27 including required care, loss of services and death that results.

28 "Bodily injury" does not include mental injuries such as:
emotional distress, mental anguish, humiliation, mental
distress, or any similar injury unless it arises out of physical
injury to the person claiming a mental injury.

18. "Property damage" means physical damage to, or destruction
of tangible property, including loss of use of this property.

(S.S. 6.)

1 The Homeowners Policy and Personal Injury Endorsement included the
2 following exclusions:

3
4 **- SECTION II – EXCLUSIONS -**

5 1. Coverage E Personal Liability and Coverage F Medical Payments to
6 Others do not apply to “personal injury”:

7 a. which is expected or intended by the “insured” . . .

8 (S.S. 7.)
9

10 Based on the terms of the Homeowners Policy, if the BCS Complaint sought
11 damage for bodily injury, property damage, or personal injury caused by an accident,
12 the duty to defend would be triggered. If the BCS Complaint sought damages for
13 personal injury stemming from a series of events proximately caused by Whiteley
14 which he did not expect or intend to cause libel, slander, or defamation of character,
15 the duty to defend would be triggered.
16

17
18 Even if the allegations of the BCS Complaint fell within the coverage promise,
19 coverage would nevertheless be excluded where the alleged libel, slander,
20 defamation, or invasion of privacy was expected or intended by Whiteley.
21

22 **B. The Umbrella Policy Language**

23 The Umbrella Policy’s personal liability coverage provides:

24 **PERSONAL UMBRELLA POLICY**

25 **- INSURING AGREEMENT -**

26 ***

27 B. Defense.
28

- 1
2 1. If a claim is made or a suit is brought against any
3 **insured** for **bodily injury** or **property damage** arising
4 from an **occurrence** to which this policy applies, or for
5 **personal injury** to which this policy applies, we will
6 provide a defense at our expense by counsel of our
7 choice, even if the suit is groundless, false or
8 fraudulent...

9 (S.S. 8.)

10 The Umbrella Policy defines “bodily injury” identical to the Homeowners
11 Policy, and includes the following additional definitions:

12 **-DEFINITIONS-**

13 ***

14 N. “**Occurrence**” means an accident, including continuous or
15 repeated exposure to substantially the same general harmful
16 conditions, which results, during the policy period, in **bodily
17 injury or property damage**.

18 O. “**Personal injury**” means injury arising out of one or more of
19 the offenses listed below . . .

- 20 1. Oral, written or electronic publication of a false statement
21 that defames a person’s or organization’s character or
22 reputation.
23 2. Oral, written or electronic publication of material that
24 violates a person’s right of privacy by publicly disclosing
25 private facts.

26 (S.S. 9.)

27 The Umbrella Policy sets forth the following exclusions:

28 **- EXCLUSIONS -**

D. This insurance does not apply to **personal injury** which
results from a false statement if done by or at the direction of
any **insured** with knowledge that the statement was false, or
made with reckless disregard for the truth.

G. This insurance does not apply to **bodily injury, property
damage or personal injury**:

7. Arising out of a criminal act or omission by, or with either the knowledge or consent of, any **insured**.

10. Arising out of any contract or agreement.

(S.S. 10.)

C. The BCS Complaint

The allegations within the BCS Complaint demonstrate USAA CIC's duty to defend was not triggered under the Policies. The BCS Complaint outlined only intentional conduct by Whiteley, including that he:

- "Engaged in acts of cyberhacking directed to BCS";
- "set-up the website infrastructure" and the "hosting account for the BCS website".
- "Acted intentionally ... and pursuant to an agreement [with McNamara] . . . to obtain and convert secret, confidential, and proprietary information [and] documents" for "their own competitive advantage, and to deprive BCS of the use of such property in business";
- "Exercised an extreme act and maliciously accessed BCS's account with Google" and "caused the website to be deindexed" using Whiteley's former administrative credentials;
- "Maliciously attempted to remove and/or gain control of the BCS website and corresponding Google Webmaster Central permissions";
- "Attempted or succeeded at changing the content of the [BCS] website" and accessed BCS's AdWords account without authorizations.

(S.S. at 11-16.)

All allegations within the BCS Complaint related to any purported defamation (which are tangential at best) implicate *only* McNamara. The BCS Complaint

1 claimed McNamara “began regularly spreading gossip and slanderous lies about
2 fellow board members among volunteers” which created tension, “conspired with
3 other volunteers and employees” including “Mary Applegate and Caroline Lorson” to
4 download and destroy confidential data, and “encouraged additional volunteers and
5 board members to leave BCS under false pretenses”. (S.S. 17-19)
6
7

8 The BCS Complaint sought damages only for financial and economic harm.
9 The BCS Complaint alleged that due to Whiteley and McNamara’s conduct, BCS
10 was unable to promote a Lifetime documentary regarding its work, lost online traffic
11 to its website, “lost business opportunities”, “lost goodwill”, breached “the trust of
12 the public”. (S.S. 20-23.) BCS also claimed its confidential information was
13 destroyed and business relationships damaged, the service it provided to the public
14 was “interrupted”, it suffered damages “in excess of \$5,000”, and Whiteley and
15 McNamara were unjustly enriched. (S.S. 22 - 24.)
16
17
18

19 **D. USAA CIC’s Investigation and Coverage Determination**

20 On April 21, 2022, Whiteley notified USAA CIC of the lawsuit. (S.S. 26.) On
21 April 22, 2022, USAA CIC Adjuster John Kaczmarek (“Kaczmarek”) was assigned
22 to the claim. (S.S. 27.)
23

24 Kaczmarek reviewed the BCS Complaint and noted it alleged Whiteley
25 “engaged in cyber hacking directed to BCS, including but not limited to the
26
27
28

1 unauthorized access of servers and networks”. (S.S. 28.) Kaczmarek then reviewed
2 the relevant Homeowners Policy terms. (*Id.*)

3
4 On April 22, 2022, Kaczmarek spoke with Whiteley regarding the BCS
5 Complaint. (S.S. 29.) Whiteley denied taking part in the allegations and stated he
6 believed he was named in the lawsuit as an act of retaliation by BCS following his
7 resignation from the board. (*Id.*) Kaczmarek advised Whiteley “based on the suit and
8 wording of the policy, there does not appear to be coverage for the loss or legal
9 representation as the loss does not meet the definition of an occurrence under the
10 policy”, but that USAA CIC’s final coverage determination was pending review by
11 its legal team. (*Id.*)

12
13 Whiteley sent Kaczmarek a message disputing the preliminary coverage
14 determination. (S.S. 30.)

15
16 Kaczmarek requested internal review of the BCS Complaint by a manager and
17 director. (S.S. 31.) Manager of Claims Operations Kathryn Mashaw agreed with
18 Kaczmarek that the duty to defend had not been triggered where the “accusations do
19 not meet definition of occurrence and no property damage present”. (S.S. 32.) On
20 April 23, 2022, Director of Claims Operations Barbara Gonzalez (“Gonzalez”)
21 reviewed the Homeowners Policy and BCS Complaint and agreed the duty to
22 defendant was not triggered and approved further review by outside coverage
23
24
25
26
27
28

1 counsel. (S.S. 33.) Whiteley contacted counsel to request a coverage review. (S.S.
2 34.)

3
4 On April 26, 2022, as Kaczmarek's investigation under the Homeowners
5 Policy was ongoing, Whiteley requested the BCS Complaint be considered under the
6 Umbrella Policy, claiming the Homeowners Policy was "not needed" because the
7 lawsuit was frivolous and caused him personal injury. (S.S. 35.)

8
9 Kaczmarek responded, correctly, that the Umbrella Policy did not provide
10 coverage for personal injury sustained by the insured because of a frivolous lawsuit,
11 and instead that personal injury referred to damages claimed by the claimant in the
12 underlying suit. (*Id.*) Nevertheless, Kaczmarek opened a separate claim. (S.S. 36.)

13
14 On April 27, 2022, Kaczmarek reviewed the Umbrella Policy and requested
15 internal review by a manager and director of the BCS Complaint in conjunction with
16 the Umbrella Policy. (S.S. 37.) Manager of Claims Operations Alisa Kuzma-Holmes
17 ("Holmes") reviewed and agreed the duty to defend was not triggered under the
18 Umbrella Policy. (S.S. 38.) Holmes requested outside coverage counsel review of the
19 Umbrella Policy in addition to its pending review of the Homeowners Policy. (*Id.*)

20
21 On April 28, 2022, Gonzalez reviewed the Umbrella Policy and agreed with
22 Kaczmarek and Holmes' coverage recommendations. (S.S. 39.)

23
24
25 **E. USAA CIC Determines the Duty to Defend or Indemnify Was Not**
26 **Triggered**
27
28

1 On April 27, 2022, Kaczmarek retained outside counsel Mark Israel (“Israel”)
2 to review the BCS Complaint, subject policies, and provide recommendations as to
3 coverage. (S.S. 40.) Israel has specialized in insurance coverage for 37 years. (S.S.
4 41.)

6 On May 3, 2022, Kaczmarek notified Whiteley the coverage review was
7 ongoing. (S.S. 42.) Whiteley continued to insist he was entitled to coverage for
8 malicious prosecution. (S.S. 43.) On May 10, 2022, Kaczmarek left Whiteley a
9 voicemail to discuss the claims. (S.S. 44.) Kaczmarek continued to notify Whiteley
10 of the status of USAA CIC’s investigation and respond to his messages. (S.S. 45.)

13 On May 16, 2022, Israel notified Kaczmarek of his recommendation that the
14 duty to defend was not triggered under the Policies. (S.S. 46.) Israel sent draft
15 language for Kaczmarek to incorporate into USAA CIC’s coverage determination
16 letter. (S.S. 47.) As explained, there was no coverage where the BCS Complaint 1)
17 alleged only economic damages and no “bodily injury” or “property damage”, 2)
18 alleged only intentional, non-accidental conduct which did not constitute an
19 “occurrence”, 3) did not allege any of the listed “personal injury” damages but
20 focused on violations of federal and California law, and 4) was otherwise excluded
21 where the “acts alleged in the complaint were committed knowingly and
22 intentionally”. (*Id.*)

1 Kaczmarek immediately notified Whiteley via phone that USAA CIC
2 determined there was no coverage under the Policies. (S.S. 48.) The following day,
3 on May 17, 2022, Kaczmarek sent Whiteley's counsel written correspondence
4 explaining the grounds for the denial of the claims and attaching Israel's proposed
5 draft letter. (S.S. 49.)
6

7
8 USAA CIC's Member Advocacy Team, Kaczmarek, and Gonzalez each
9 continued to investigate and respond to Whiteley's complaints regarding USAA
10 CIC's communications with him and contacted him separately to discuss. (S.S. 50-
11 51.) In response, Whiteley continued to reiterate the same groundless complaints.
12
13 (*Id.*)

14 Whiteley nor his counsel contacted USAA CIC regarding the claims for over a
15 year.
16

17 On September 21, 2023, Whiteley's counsel demanded "immediate withdrawal
18 of the wrongful denial" of Whiteley's claims. (S.S. 53.) Both Kaczmarek and Holmes
19 reviewed the correspondence and sent it to Israel for further review and updated
20 recommendations and notified Whiteley's counsel of the same. (S.S. 54-56.)
21

22 On November 9, 2023, Israel notified Kaczmarek that his review of the
23 additional correspondence did not change his recommendations and sent a draft
24 response to Whiteley's counsel providing his analysis. (S.S. 57-58.)
25
26
27
28

1 Kaczmarek notified Whiteley's counsel that his correspondence was reviewed
2 by counsel, and USAA CIC's coverage determination remained unchanged. (S.S. 59.)
3

4 In response, Whiteley filed the instant lawsuit alleging causes of action for
5 breach of contract, breach of the implied covenant of good faith and fair dealing, and
6 declaratory relief, and seeking punitive damages.
7

8 9 10 **III. LEGAL STANDARD**

11 Summary judgment "shall be granted if all papers submitted show that there is
12 no triable issue as to any material fact and the moving party is entitled to judgment as
13 a matter of law." (Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323
14 (1986).) The moving party bears the initial burden of identifying the element of the
15 claim or defense on which summary judgment is sought and evidence that it believes
16 demonstrates the absence of an issue of material fact. (*Celotex, supra* 477 U.S. at 323
17 (1986).)
18

19
20 The non-moving party then "must set forth specific facts showing that there is
21 a genuine issue for trial." (*Anderson*, 477 U.S. at 250 (citation omitted); "Where the
22 record taken as a whole could not lead a rational trier of fact to find for the
23 nonmoving party, there is no "genuine issue for trial." (*Matsushita Elec. Indus. Co. v.*
24 *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).) "The mere existence of some alleged
25 factual dispute between the parties will not defeat an otherwise properly supported
26
27
28

1 motion for summary judgment. (*Anderson*, 744 U.S. at 248 (internal quotation marks
2 omitted).)

3
4 Here, the undisputed material facts demonstrate the allegations within the BCS
5 Complaint did not trigger USAA CIC's duty to defend, USAA CIC's investigation
6 and coverage determination was reasonable, there are no grounds for declaratory
7 relief, and the Court should grant summary judgment for USAA CIC.
8

9
10
11 **IV. USAA CIC'S DUTY TO DEFEND OR INDEMNIFY WAS NOT**
12 **TRIGGERED**

13 The allegations within the BCS Complaint do not set forth any potential for
14 coverage under the Policies, USAA CIC's duty to defend was never triggered, and
15 Whiteley's breach of contract claim fails.
16

17 Under California law, an insurer has a duty to defend an insured if it becomes
18 aware of, or if a third-party lawsuit pleads, facts giving rise to the potential for
19 coverage under the insuring agreement. (*Montrose Chemical Corp. v. Superior*
20 *Court* 6 Cal.4th 287, 295 (1993); *Street Surfing, LLC v. Great American E&S Ins.*
21 *Co.*, 776 F.3d 603, 607 (9th Cir. 2014).) Where there is no possibility of coverage,
22 there is no duty to defend. (*Waller, supra*, 11 Cal. 4th 19.)
23
24

25 To succeed on summary judgment, the insurer must show the underlying claim
26 cannot fall within policy coverage under any reading of the lawsuit. (*Delgado v.*
27
28

1 *Interinsurance Exch. Of Auto. Club of S. Cal.*, 47 Cal.4th 302, 308 (2009); *Waller*,
2 *supra*, 11 Cal. 4th at 16.)

3
4 “[W]hether the insurer owes a duty to defend usually is made in the first
5 instance by comparing the allegations of the complaint with the terms of the policy.”
6 (*Waller*, 11 Cal. 4th at 19.) “[C]overage turns not on the technical legal cause of
7 action pleaded by the third party but on the facts alleged in the underlying complaint
8 ...” (*Swain v. Cal. Cas. Ins. Co.* (2002) 99 Cal. App. 4th 1, 8 (citation omitted).) In
9 other words, the nature of the conduct alleged by the third-party complainant that
10 forms not only the basis for the complaint but also whether the insurer’s duty to
11 defend is triggered.
12

13
14 An insurer is under no obligation to investigate facts outside of the third-party
15 complaint when “it assume[s] the [insured’s] version of the facts to be correct, but
16 [finds] no potential for coverage anyway.” (*Turner v. State Farm Fire and Cas.*
17 *Co.* (2001) 92 Cal.App.4th 681, 690.)
18

19
20 In California, by longstanding statute and as a matter of public policy, an
21 insured is not entitled to coverage “for willful injuries by the insured against a third
22 party”. (*Waller, supra* 11 Cal. 4th 19; Cal. Civ. Code. §1668 [enacted 1872].)
23

24 **A. There is No “Bodily Injury” or “Property Damage” Alleged in the BCS**
25 **Complaint, and the Duty to Defend Was Not Triggered**

26 Under both Policies, USAA CIC’s duty to defend could be triggered if the
27 BCS Complaint sought damages for “bodily injury” or “property damage” caused by
28

1 an “occurrence”, defined as an accident. (S.S. 4-6, 8-9.) Nowhere within the BCS
2 Complaint is there any allegation related to bodily injury or property damage, as
3 defined in the policy. (S.S. 3 [BCS Complaint, generally].) Nor is there any
4 allegation that Whiteley and McNamara’s conduct was accidental within the subject
5 Complaint. (*Id.*) Whiteley does not, and cannot, attempt to claim otherwise. (Dkt. 1,
6 generally.)
7

8
9 Therefore, the “personal injury” terms and endorsement within the Policies
10 must apply for USAA CIC’s duty to defend to be triggered.
11

12 **B. There is No “Personal Injury” Alleged in the BCS Complaint, and the**
13 **Duty to Defend Was Not Triggered**

14 Neither the Homeowners Policy nor Umbrella Policy contain allegations
15 amounting to “personal injury” under their respective terms, and USAA CIC’s duty
16 to defend was not triggered.
17

18 Under the Homeowners Policy, if the BCS Complaint sought damages for
19 libel, slander, or defamation of character (“personal injury”) stemming from a series
20 of events proximately caused by Whiteley which he did not expect or intend to cause,
21 the duty to defend would be triggered. (S.S. 4-5.)
22

23 Under the Umbrella Policy, if the BCS Complaint sought damage for the
24 “publication of a false statement” that either “defames an organization’s character or
25 reputation” or “violates a person’s right of privacy by publicly disclosing private
26 facts”, the duty to defend would be triggered. (S.S. 8-9.)
27
28

1 ***1. The BCS Complaint Does Not Allege “Personal Injury”***

2 Both Policies require allegations that the insured defamed the character of
3
4 another entity as a threshold element. Absent any claims of defamatory conduct, the
5 duty to defend cannot be triggered.

6 Here, there are no allegations whatsoever that Whiteley made any false or
7
8 defamatory statement which derided BCS’ character. As to Whiteley, the BCS
9 Complaint alleges only that he initially set up website infrastructure and a hosting
10 account for BCS, resigned from the board of directors, and then acted intentionally
11 and maliciously in deindexing BCS’ Google account and attempting to gain control
12 of its website. (S.S. 12-16.)

13
14 USAA CIC anticipates Whiteley will rely on paragraphs 45, 47 and 48 to
15 demonstrate allegations reflecting defamation. In paragraph 45, BCS alleges
16 “McNamara and her colleagues at Unsilenced made defamatory statements” which
17 resulted in “strained” and “terminated” business relationships. (S.S. 22.) In paragraph
18 47, BCS alleges “defendants . . . disclosed misleading information to the public”
19 which caused damage. (S.S. 23.) In paragraph 48, BCS “seeks recovery for lost
20 goodwill as a result of Defendant’s dissemination of false information by
21 impersonating BCS”. (S.S. 24.)

22
23 Nowhere does the BCS Complaint allege Whiteley himself made a defamatory
24 or false statement. (S.S. 3, generally.) As Israel testified, the BCS Complaint was
25
26
27
28

1 “very clear and detailed” and “alleged precisely what it wishes to allege and it does
2 not allege any defamatory statement of fact” by Whiteley. (S.S. 60.) Israel reviewed
3 the complaint at his deposition and testified “there has to be a factual allegation” not
4 based on “speculation as to what the intent was” for the duty to defend to be
5 triggered. (S.S. 61.)
6
7

8 Likewise, the BCS Complaint does not state or even imply BCS (or anyone
9 else)’s character or reputation was defamed by any purportedly false statement. (S.S.
10 3, generally.) The reference to “strained” or “terminated” relationships is insufficient
11 to demonstrate defamation to reputation. This allegation shows only that
12 McNamara’s statements impacted BCS’s ability to conduct business by interfering
13 with its relationships – not its overall reputation in the community and industry.
14
15

16 The BCS Complaint is *not* about harm to BCS’s reputation through defamation
17 or slander. Instead, the crux of the BCS Complaint relies upon allegations of
18 intentional conduct which purportedly caused financial harm and fall squarely
19 outside the coverage promised by the Policies. (See, S.S. 3, generally.)
20

21 The BCS Complaint does not contain allegations which, even if accepted as
22 true, constitute “personal injury” under the Homeowners Policy or the Umbrella
23 Policy, and Whiteley cannot demonstrate the possibility of coverage. Where there is
24 no possibility of coverage, there is no breach of contract.
25
26
27
28

1 **2. Even Assuming “Personal Injury”, Multiple Exclusions Apply to**
2 **Foreclose Coverage**

3 Even assuming *arguendo*, the allegations within the BCS Complaint
4
5 amounted to “personal injury” as defined in the Policies – *which they do not* – USAA
6 CIC’s duty to defend would nevertheless be excluded.

7 Under the Homeowners Policy, where the alleged libel, slander or defamation
8
9 was “malicious or criminal in nature” or “expected or intended by the insured”,
10 coverage is excluded. (S.S. 7.) Here, **both** exclusions apply.

11 The BCS Complaint characterizes Whiteley’s conduct as “malicious”
12
13 throughout and brings causes of action for criminal conduct including violations of
14 California’s penal code. (S.S. 3, 14-15.)

15 Further, the conduct and resulting damage to BCS alleged were expected and
16
17 intended by Whiteley. A person cannot unexpectedly or unintentionally use expired
18 credentials to gain access to and deindex the Google Account of a non-profit they
19 previously worked with. Those are affirmative, intentional acts. As discussed above,
20
21 the allegations within the BCS Complaint regarding Whiteley’s conduct are
22 exclusively intentional and purposeful in nature. (S.S. 11-16.) Further, a reasonable
23
24 person would expect actions such as those allegedly taken by Whiteley to result in
25 damage.

26 Any coverage under the Homeowners Policy is thus excluded.
27
28

1 Under the Umbrella Policy, coverage would be excluded where 1) Whiteley
2 knew the defamatory statement was false or made it with reckless disregard for the
3 truth, 2) the alleged personal injury arose out of a criminal act by Whiteley or 3) the
4 alleged personal injury arose out of any contract or agreement into which Whiteley
5 entered. (S.S. 10)
6

7
8 First, to the extent Whiteley is alleged to have made any defamatory statement,
9 he did so with knowledge of its falsity or at a minimum disregard for its veracity and
10 coverage would be excluded.
11

12 Second, as stated, the BCS Complaint claims Whiteley's conduct violated
13 multiple criminal statutes, such that any personal injury alleged therein arose out of
14 excluded criminal acts. (S.S. 3.)
15

16 Third, the BCS Complaint continually alleges Whiteley and McNamara's
17 conduct was based upon an agreement between them to harm BCS and unjustly
18 enrich themselves. (S.S. 13 ["defendants acted intentionally, in concert, and pursuant
19 to an agreement between and among them"].) Coverage is excluded where the
20 lawsuit arose out of Whiteley and McNamara's agreement to harm BCS.
21

22 Where multiple exclusions apply from both Policies, even if the BCS
23 Complaint included allegations giving rise to USAA CIC's duty to defend – which it
24 does not – coverage would nevertheless be excluded.
25
26
27
28

1 **3. Even Assuming “Personal Injury” Is Alleged and No Exclusions**
2 **Apply, there is No Duty to Defend an Action Alleging Purely**
3 **Economic Damages**

4 In addition to the failure of the allegations in the BCS Complaint to fall within
5 the scope of the Policies’ coverage promises and not be otherwise excluded, the BCS
6 Complaint does not seek the type of damages for which an insured is entitled to
7 coverage under California law.
8

9 The California Supreme Court held: “strictly economic losses like lost profits,
10 loss of goodwill, loss of the anticipated benefit of a bargain, and loss of an
11 investment, do not constitute damage or injury” covered by a liability insurance
12 policy. (*Waller, supra*, 11 Cal. 4th 17.) Multiple federal courts applying California
13 law agree. (*See, Scottsdale, Ins. Co. v. Darke*, 424 F.Supp.3d 638, 644 (N.D. Cal.
14 2019); *Travelers Property Casualty Company of America v. Allwire, Inc.*, 508
15 F.Supp.3d 736, 745-746 [collecting cases holding “damages for lost profits, loss of
16 investment or other harm to one’s economic interest constitute injuries to intangible
17 property by which definition fall outside the scope of the policy”].)
18
19
20

21 The BCS Complaint alleges only financial and economic intangible damages,
22 including but not limited to a “dramatic drop in traffic” to the BCS website, “breach
23 of the trust of the public”, destruction of confidential and proprietary information,
24 “damaged relationships”, “lost business opportunities”, lost “monetary donations”,
25
26
27
28

1 lost goodwill”, unjust enrichment”, an “interruption” in BCS’s service to the
2 community, and monetary damages “in excess of \$5,000”. (S.S. 19-25.)
3

4 Where the BCS Complaint was not brought to recover damages related to
5 bodily injury, property damage, or personal injury, and instead seeks recovery for
6 financial and economic losses, no coverage is available under either of the Policies,
7 there was no breach of contract, and USAA CIC’s Motion for Summary Judgment
8 should be granted.
9
10
11

12 **V. THE BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR**
13 **DEALING CLAIM FAILS**

14 USAA CIC did not owe Whiteley a duty to defend and otherwise acted
15 reasonably and in accordance with its duty of good faith and fair dealing in the
16 handling of the claims, and Whiteley’s cause of action for insurance bad faith should
17 be summarily adjudged in USAA CIC’s favor.
18

19 To establish a breach of the implied covenant, Whiteley has the burden of
20 demonstrating he suffered a loss covered under the Policies, notified USAA CIC of
21 the loss, USAA CIC unreasonably declined to provide a legal defense or
22 indemnification, he was harmed, and USAA CIC’s delay in the disbursement of
23 benefits under the Policies was a substantial factor in causing the harm. (CACI 2331-
24 2332; *Benavides v. State Farm Gen. Ins. Co.*, 136 Cal. App. 4th 1241, 1250 (2006)
25
26
27
28

1 [“first, that benefits were due under the policy, and second, that the benefits were
2 withheld without proper cause”].)

3
4 Under California law, “as long as the insurer’s coverage decision was
5 reasonable, it will have no liability for breach of the covenant of good faith and fair
6 dealing.” (*Morris v. Paul Revere Life Ins. Co.* (2003) 109 Cal.App.4th 966, 977.)
7
8 “Unreasonable” conduct is not synonymous with mistaken, sloppy or even negligent
9 claims handling. (*Careau & Co. v. Sec. Pac. Bus. Credit, Inc.*, (1990) 222 Cal. App.
10 3d 1371, 1395; *Chateau, supra*, 90 Cal. App. 4th 350 [“it is not enough to say... that
11 [the insurer] could have done a better job in adjusting [a] claim.”]; *Congleton v.*
12 *National Union Fire Ins. Co.* (1987) 189 Cal. App. 3d 51, 59 [“bad faith” liability
13 does not rest on an insurer’s “mistaken judgment”].) Rather, bad faith liability
14 requires conscious misconduct. (*Careau, supra*, 222 Cal. App. 3d 1395.)
15
16

17 Further, “an insurer may defend itself against allegations of bad faith and
18 malice in claims handling with evidence the insurer relied on the advice of competent
19 counsel.” (*State Farm, supra*, 228 Cal. App. 3d 725.)
20

21 Under California’s “genuine dispute doctrine”, so long as an insurer’s
22 declination of a claim is based upon “the existence of a genuine dispute with its
23 insured as to the existence of coverage” the insurer cannot be liable in bad faith.”
24 (*Chateau Chamberay, supra*, 90 Cal.App.4th 347; *Wilson v. 21st Century Ins. Co.*
25 (2007) 42 Cal.4th 713, 721.) The “genuine dispute” doctrine stems from the
26
27
28

1 recognition that insurance companies should be able to investigate claims without
2 fear of accusations of breaching the implied covenant. (*Austero v. Nat. Gas Co.*
3 (1978) 84 Cal.App.3d 1, 30.)
4

5 Here, the undisputed material facts show Whiteley cannot meet his burden of
6 demonstrating USAA CIC breached the implied covenant of good faith and fair
7 dealing.
8

9 First, California law is clear a breach of implied covenant claim cannot stand
10 alone. Where, as discussed above, USAA CIC's duty to defend was not triggered
11 under the Policies and there is no breach of contract, there can be no bad faith.
12

13 Second, even assuming *arguendo* the claim could survive independent of the
14 breach of contract claim (which it cannot), the undisputed facts demonstrate USAA
15 CIC acted reasonably, promptly, and in reliance on the advice of counsel, and as a
16 matter of law did not breach the implied covenant of good faith and fair dealing.
17

18 Kaczmarek immediately reviewed the BCS Complaint and the Homeowners
19 Policy and called Whiteley to discuss, notifying him it did not appear from his initial
20 review there was coverage, but that he would obtain a legal review. (S.S. 28-29.)
21 Kaczmarek then sought review by a manager and director, both of whom agreed the
22 BCS Complaint did not appear to set forth allegations which would fall within the
23 Homeowners Policy's insuring agreement. (S.S. 31-33.)
24
25
26
27
28

1 Kaczmarek opened a separate claim under the Umbrella Policy, and again
2 notified Whiteley it was his impression the BCS Complaint would not trigger
3 USAA's duty to defend thereunder. (S.S. 35-36.) Holmes and Gonzalez reviewed the
4 Umbrella Policy and BCS Complaint and agreed with Kaczmarek. (S.S. 37-39.)
5

6 Kaczmarek then retained Israel, a seasoned coverage attorney, who reviewed
7 the BCS Complaint in conjunction with both Policies and recommended coverage be
8 denied as USAA CIC's duty to defend was not triggered under policy for multiple
9 reasons. (S.S. 34, 40, 41, 46.) Israel provided a detailed analysis setting for the basis
10 for his recommendations. (S.S. 46-47.)
11

12 Kaczmarek promptly conveyed USAA CIC's coverage determination to
13 Whiteley both by phone and in writing. (S.S. 42-45, 48, 49.) Kaczmarek, Holmes and
14 Gonzalez continued to address Whiteley's various complaints regarding how the
15 claims were handled. (S.S. 50-52.) Whiteley did not dispute the coverage
16 determination, or otherwise contact USAA CIC, for over one year.
17

18 When his counsel demanded USAA CIC withdraw its denial, Kaczmarek sent
19 the correspondence to Israel for an additional, updated review. (S.S. 53-56.) Israel
20 determined his recommendations were not altered by the positions set forth in
21 Whiteley's counsel's correspondence. (S.S. 57-58.) Kaczmarek communicated
22 USAA CIC's affirmation of its coverage denial to Whiteley and his counsel,
23
24
25
26
27
28

1 providing a detailed explanation and response to Whiteley’s counsel’s positions and
2 arguments. (S.S. 59.)

3
4 The undisputed facts demonstrate USAA CIC’s investigation of both claims
5 was reasonable.

6 Third, the undisputed material facts establish USAA CIC and Whiteley – both of
7 whom sought the advice of counsel – had a genuine dispute as to whether the duty to
8 defend was triggered by the allegations in the BCS Complaint. (S.S. 46-49, 53, 57-59.)

9
10 The undisputed facts demonstrate Whiteley’s claim for breach of the implied
11 covenant fails on multiple grounds, and USAA CIC is entitled to summary judgment.
12

13
14
15 **VI. THE CLAIM FOR DECLARATORY RELIEF FAILS**

16 Whiteley’s request for declaratory relief should be decided as a matter of law
17 and subsequently dismissed. “Summary judgment is appropriate in a declaratory
18 relief action when only legal issues are presented for the court’s determination.”
19 (*California Public Records Research, Inc. v. County of Yolo*, 4 Cal. App. 5th 150,
20 187 (2016.)) When the court deems summary judgment appropriate, it should “decree
21 only that plaintiffs are not entitled to the declarations in their favor.” (*Gafcon, Inc. v.*
22 *Ponsor & Associates*, 98 Cal. App. 4th 1388, 1401 (2002).) A plaintiff is not entitled
23 to a declaration in its favor where such a declaration would be legally incorrect, [or]
24 the undisputed facts do not support the declaration”. (*California Public Records*
25
26
27
28

1 *Research, Inc., supra*, 4 Cal. App. 5th at 187; *Gafcon, Inc., supra*, 98 Cal. App. 4th at
2 1402.)

3
4 As discussed above, USAA CIC's coverage determination was appropriate and
5 its duty to defend was not triggered under the Policies. Moreover, USAA CIC
6 conducted its investigation reasonably, promptly, in reliance on the advice of
7 counsel, and in good faith. Thus, any declaratory relief in Whiteley's favor would be
8 legally incorrect. Therefore, the Court should determine as a matter of law Whiteley
9 is not entitled to declaratory relief, and USAA CIC is entitled to summary judgment.
10
11

12
13 **VII. THE CLAIM FOR PUNITIVE DAMAGES FAILS**

14 Whiteley has not, and cannot, provided any evidence to support a claim for
15 punitive damages – much less that which rises to the required clear and convincing
16 standard.
17

18 “The law does not favor punitive damages, and they should be granted with the
19 greatest caution.” (*Beck v. State Farm Mut. Auto. Ins. Co.* (1976) 54 Cal. App. 3d
20 347, 355.) A claim for punitive damages requires proof “by clear and convincing
21 evidence that the defendant has been guilty of oppression, fraud, or malice.” (Cal.
22 Civ. Code § 3294(a).) Whiteley must show USAA CIC committed despicable acts
23 with the intent to cause injury, with a willful disregard to the safety of others, or
24 which subjected her to cruel and unjust hardship in conscious disregard of her rights.
25 (Cal. Civ. Code 3294(c) (1-3).) Conduct that is “vile, base, contemptible, miserable,
26
27
28

1 wretched or loathsome”, and which would be “despised by ordinary decent people”,
2 is considered despicable under California law. (*Tomaselli v. Transamerica Ins. Co.*
3 (1994) 25 Cal. App. 4th 1269, 1286.)
4

5 In the insurance context, “punitive damages are not available for breaches of
6 contract no matter how gross or willful”. (*Tibbs v. Great American Ins. Co.* (9th Cir.
7 1985) 755 F.2d 1370, 1375; *Tomaselli, supra* 25 Cal. App. 4th 1286; Cal. Civ. Code
8 § 3294(a).) A mistake of law, honest error in judgment, overzealousness, or even
9 negligence by an insurance company does not support a claim for punitive damages.
10 (*Ittelia Foods, Inc. v. Zurich Ins. Co.* (9th Cir. 2004) 98 Fed. Appx. 689, 691;
11 *Tommaselli, supra*, 25 Cal. App. 4th 1286.)
12
13

14 As discussed at length above, USAA CIC’s coverage determination was
15 appropriate based on its review of the allegations within the BCS Complaint and its
16 reliance on the advice of counsel. USAA CIC’s investigation was reasonable and
17 timely. There is no indication whatsoever USAA CIC acted with malice. At all times
18 during the handling of the claim Kaczmarek and his team reviewed and considered
19 all information submitted, kept an open mind, never made any decision or conducted
20 any activity on the claim with any intent to cause harm, and never intended to make
21 nor did make any misrepresentations to Whiteley. (S.S. at ¶62.) Whiteley’s general
22 disagreement with USAA CIC’s declination of coverage, without more, is
23 insufficient to support a claim for punitive damages.
24
25
26
27
28

1 Lastly, Whiteley cannot meet his additional burden of showing that an officer,
2 director, or managing agent had advance knowledge of and ratified the conduct. (Cal.
3 Civ. Code § 3294(b).) Under California law, a “managing agent” includes “only
4 those corporate employees who exercise substantial independent authority and
5 judgment in their corporate decision making so that their decisions ultimately
6 determine corporate policy.” (*White v. Ultramar, Inc.* (1999) 21 Cal. 4th 563, 566-
7 567.) Whiteley cannot set forth any evidence identifying an officer, director, or
8 managing agent of USAA CIC who was involved in the handling of the claim. (S.S.,
9 generally.) Nor has Whiteley made any allegations or submitted proof that any
10 managing agent knew about or ratified purportedly despicable conduct in the
11 handling of his claim.
12

13 The undisputed facts demonstrate Whiteley cannot meet his burden to the
14 requisite heightened standard as to the punitive damages claim, and summary
15 judgment should be granted in USAA’s favor.
16

17 **VIII. CONCLUSION**

18 For the foregoing reasons, USAA CIC respectfully requests that this Court
19 grant summary judgment in its favor as to all causes of action.
20
21
22
23
24
25
26
27
28

1 DATED: January 31, 2025

DKM LAW GROUP, LLP

3 By: /s/Jessica J. Ross

4 JOSHUA N. KASTAN (SBN 284767)

5 JNK@dkmlawgroup.com

6 JESSICA J. ROSS (SBN 313988)

7 JJR@dkmlawgroup.com

8 Attorneys for Defendant,

9 USAA CASUALTY INSURANCE
COMPANY

10 **CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 11-6.2**

11 The undersigned, counsel of record for USAA Casualty Insurance Company,
12 certifies that this brief contains 6, 786 words, which complies with the word limit of
13 L.R. 11-6.1.
14

15 DATED: January 31, 2025

DKM LAW GROUP, LLP

17 By: /s/Jessica J. Ross

18 JOSHUA N. KASTAN (SBN 284767)

19 JNK@dkmlawgroup.com

20 JESSICA J. ROSS (SBN 313988)

21 JJR@dkmlawgroup.com

22 Attorneys for Defendant,

23 USAA CASUALTY INSURANCE
COMPANY
24
25
26
27
28